



Law Society
of Scotland



Consultation Response

Confidentiality Clauses

April 2019



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Non-disclosure agreements are contracts. Accordingly, their use and enforcement is a matter of contract law, which, in Scotland is devolved. We have accordingly treated the Department for Business, Energy & Industrial Strategy's consultation: Confidentiality Clause as limited to reserved matters, including such criminal matters as are reserved. On that basis, our Equalities Law, Equality and Diversity, and Employment Law committees welcome the opportunity to consider and respond to the Department for Business, Energy & Industrial Strategy's consultation: Confidentiality Clauses. The committees have the following comments to put forward for consideration.

General comments

We note that the scope of this consultation covers both employment contracts and settlement agreements. It is important to recognise that these are very different types of documents. For example, independent advice is a requirement for settlement agreements, but is unlikely to be taken in relation to employment contracts. The types of information that confidentiality clauses will be aiming to cover in each situation is also very different, with settlement agreements addressing situations of conflict, whereas employment contracts are most likely to be targeting intellectual property and operational information.

There are clearly situations where individuals have been unclear about the extent and impact of confidentiality clauses, and this is an issue that should be addressed. In addition, the legal profession should be properly informed and able to draft clauses that are clear and comply with the law. However, we are not aware of any evidence that there is widespread deliberate abuse or misuse of confidentiality clauses. Such clauses are used in a wide variety of situations, and are often of benefit to both parties to the agreement. Particularly in settlement agreements, where there are duties of confidentiality these are often mutual. Sometimes they are used to protect an employee.

In respect of employment contracts, confidentiality clauses are usually used to protect information which is genuinely business/commercially sensitive. Such clauses could not usually be applied in relation to inappropriate behaviour.

We strongly support the need to address the genuine and serious concerns that have been raised in the context of recent discussions around bullying and harassment in the workplace and, in particular, the use of non-disclosure agreements and confidentiality clauses. Attempts to address the issues that do exist should be proportionate and focus on achieving better results for all relevant parties through increasing awareness of the proper use of and the limits that apply to confidentiality clauses in settlement agreements and in employment contracts. Consideration should also be given to ensuring that there are sources of independent advice and information for people who may find themselves being asked to agree to confidentiality clauses.

Consultation questions

Question 1: Do you have any examples of confidentiality clauses, in employment contracts or settlement agreements, that have sought to cloud a worker's right to make a protected disclosure, or overstretch the extent to which information is confidential? If so, please describe these.

Although there have been well publicised examples of misuse in recent times, we are not aware of this as a frequent issue. In the experience of the practitioners on our relevant committees, they have not come across instances of deliberate misuse of confidentiality clauses through clouding rights or overstretching what information is covered. We are not aware of any evidence of significant issues with the use of confidentiality clauses. However, there may be a risk of misunderstanding of clauses by the parties, if they are not properly advised.

Question 2: In your view, should all disclosures to the police be clearly excluded from confidentiality clauses? Why?

Any attempt to restrict an individual's ability to report potentially criminal behaviour to the police would be highly unlikely to be enforceable under current law, as it would be contrary to public policy.

Introducing legislation on this point may increase certainty, but steps would also need to be taken to raise awareness to ensure that parties were clear that such disclosures are always permissible.

An alternative to legislation would be to increase awareness of the current law, making clear that it will generally not be acceptable to contractually prevent someone from making a report to the police.

Question 3: What would be the positive and negative consequences of this, if any?

As discussed above, such a change could be considered unnecessary, as there is already a public interest issue in ensuring individuals can make disclosures to the police. Lack of awareness is a separate issue. Legislation is one approach to improve clarity and raise awareness, but other options are available, including improving guidance, information, and advice for both advisors and parties.

The time and resource required for legislative change may be justified in the context of increased certainty, but efforts to raise awareness and understanding will still be required to achieve the aims.

Question 4: Should disclosures to any other people or organisations be excluded?

The consultation notes (at page 10) that there are already provisions in place to allow for protected disclosure or 'whistleblowing'. However, in order to benefit from the provisions certain criteria must be satisfied:

- The individual must be acting in the public interest (not private interest or grievance)
- The disclosure shows past, present or possible likely future wrongdoing (this would include criminal offences, dangers to health and safety, failure to comply with legal obligations or covering up a wrongdoing)
- The disclosure is made to a **'prescribed person'**

We note that the list of prescribed persons includes national agencies and health service regulators, such as the General Medical Council, General Optical Council, General Pharmaceutical Council etc. In addition, it also includes legal advisors. However, as further noted, it does not include legal sector regulators. Legal sector regulators have a responsibility to ensure that those it regulates maintain professional standards and do not engage in any activity (criminal or otherwise), which is detrimental to the public interest and undermines client confidence and trust, is contrary to the rule of law or dilutes the reputation of the legal profession. A robust regulatory framework is underpinned by a proactive and reactive investigation and enforcement regime which allows preventative steps to be taken where actual or potential risk has been identified. There are occasions where an investigation is triggered by intelligence received and this may come from an employee or former employee of a legal practice.

We are concerned that, as it currently stands, there is no protection under whistleblowing provisions for any individual who informs a legal sector regulator of past, current or potential irregular activities, as legal sector regulators are excluded from the list of prescribed persons. The effect of this is that any individual whom may be subject to a confidentiality clause may be dissuaded from reporting concerns relating to any actions of a solicitor employer or former solicitor employer on any matter which may relate to any actual or suspected wrongdoing.

In addition, the list of prescribed persons does not include those organisations which undertake the role of anti-money laundering (AML) supervisors, such as the Law Society of Scotland, who are regulated by the Office for Professional Body AML Supervisors (OPBAS). Although there is a statutory duty under the

Proceeds of Crime Act and AML legislation to report certain matters to the relevant authority, i.e. the National Crime Agency, there is no protection afforded to an individual who may disclose AML wrongdoing to those organisations performing the role of AML supervisor.

We suggest that legal service regulators and AML supervisors be added to the list of prescribed persons for the purposes of the whistleblowing criteria. In addition, that protection be afforded to any disclosure made to legal service regulators, regardless of whether or not other aspects of the criteria is satisfied. This would remove the potential threat of reprisal in any form where an individual breaches a confidentiality clause by reporting a suspected, actual or potential wrongdoing by a solicitor employer. The basis for this is to support and strengthen the regulatory regime to ensure that public confidence and interests are not undermined by unlawful or inappropriate activities and practices.

Question 5: Are there any other limitations you think should be placed on confidentiality clauses, in employment contracts or settlement agreements?

We are not aware of any need or demand for further limitations.

Question 6: Do you agree that all confidentiality clauses in settlement agreements, and all written statements of employment particulars, should be required to clearly highlight the disclosures that confidentiality clauses do not prohibit?

No.

Increasing the amount of information required to be included in a confidentiality clause would be likely to result in such clauses becoming longer and more complex, potentially leading to more confusion by not allowing for clauses to be properly tailored to what is relevant in different situations, and encouraging over-drafting to ensure compliance.

In the case of settlement agreements, it is a requirement that the employee must have received independent advice “as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an employment tribunal”.¹ This will include advice on the extent of any confidentiality clause, and what it does and does not cover.

¹ Section 203(3) (c), Employment Rights Act 1996

Question 7: As part of this requirement, should the Government set a specific form of words?

No.

As discussed above, we do not support the introduction of a requirement to specify within a confidentiality clause what types of disclosure are not prohibited. These clauses are used in a wide variety of settings and by a wide range of employers, and different wording may be desirable in different situations.

However, guidance and examples or style clauses may be helpful.

Question 8: Do you agree that the independent advice a worker receives on a settlement agreement should be specifically required to cover any confidentiality provisions?

As discussed in question 6, above, this will often be covered in practice. If it is felt that this should be expressly covered by statute, care should be taken to avoid creating a situation that requires more time and procedure without proportionate benefits.

Question 9: Do you think a confidentiality clause within a settlement agreement that does not meet any new wording requirements should be made void in its entirety? What would be the positive and negative consequences of this?

No.

We do not support the introduction of wording requirements. If such a requirement is introduced, a breach should not result in the entire clause being unenforceable, as this is likely to be a disproportionate effect. As discussed above, it may also result in clauses becoming longer and more complex in an attempt to ensure compliance.

Question 10: Do you agree with our proposed enforcement mechanism for confidentiality clauses within employment contracts? What would be the positive and negative consequences of this?

No.

The proposed enforcement mechanism would have a very limited beneficial impact. The requirement for a separate claim may result in exacerbating other issues to enable the claim on drafting to also be included.

This proposal does little to address the underlying concern of a lack of awareness and understanding of the effects and limits of confidentiality clauses.

For further information, please contact:

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